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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 196[illegible]

ADKINS TRANSFER COMPANY, INC.,
ADKINS CARGO EXPRESS, INC., and
TENNESSEE CARTAGE COMPANY, INC.,
Appellants,

vs.

HAROLD DORNBOS and BEVERLY DORNBOS,
Individually and d/b/a H. J. DORNBOS
& BRO., a Co-Partnership

and

THE KROGER COMPANY and
ROOKS TRANSFER LINES, INC.,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

JURISDICTIONAL STATEMENT

Appellants, pursuant to United States Supreme Court Rules 13(2) and 15, file this statement of the basis upon which it is contended that the Supreme Court of the United States has, and should exercise, jurisdiction in this case on appeal to review a final decision of the Michigan Supreme Court denying these appellants' application for leave to appeal to that Court.

I. OPINIONS BELOW

The Michigan Supreme Court delivered no written opinion in this case A copy of their order denying appellants' application for leave to appeal is attached (Appendix C, page 30). A copy of their order denying appellants' motion for reconsideration is also attached (Appendix D, page 32). Copies of the Ottawa County Circuit Court (Appendix A, page 21) and of the Michigan Court of Appeals opinions (Appendix B, page 25) denying appellants' motion to quash service of process and dismiss for lack of jurisdiction are also attached to this jurisdictional statement.

II. GROUNDS FOR UNITED STATES SUPREME COURT JURISDICTION

This appeal is from a final order of the Michigan Supreme Court denying appellants' application for leave to appeal from a decision of the Michigan Court of Appeals. The latter affirmed an Ottawa County Circuit Court order which denied appellants' motion to quash service of process and dismiss for lack of jurisdiction. This motion challenged the constitutional validity of the lower court's assumption of jurisdiction over these appellants under Section 715 of the Revised Judicature Act (part of the so-called long-arm statute).

The final orders appealed from were entered on August 20, 1968 and October 30, 1968. Notices of appeal to the United States Supreme Court were filed in the Ottawa County Circuit Court on October 21, 1968 and November 5, 1968.

The Supreme Court of the United States has jurisdiction to review by appeal the order complained of by virtue of the provisions of 28 U.S.C. §1257 (2).

The following decisions sustain the jurisdiction of the United States Supreme Court to review the order on appeal in this case:

Rosenblatt v. American Cyanamid Co., 15 L. ed 2d 39 (1965);

Local 438 Construction Laborers' Union v. Curry, 371 US 542 (1963);

Mercantile Nat'l Bank v. Langdeau, 371 US 555 (1963).

Appellants have asserted in the courts below that they are not subject to jurisdiction in Michigan under the long-arm statute. The constitutional validity of Section 715 as applied to the instant facts has been questioned and challenged. RJA §715 (M.S.A. §27A.715) provides:

> "The existence of any of the following relationships between a corporation or its agent and the State shall constitute a sufficient basis of jurisdiction to enable the courts of record of this State to exercise limited personal jurisdiction over such corporation and to enable such courts to render personal judgment against such corporation arising out of the act or acts which create any of the following relationships:
>
> 1. The transaction of any business within the State.
> 2. The doing or causing any act to be done, or consequences to occur, in the State resulting in an action for tort.
> 3. The ownership, use, or possession of any real or tangible personal property situated within the State.
> 4. Contracting to insure any person, property, or risks located within this State at the time of contracting.
> 5. Entering into a contract for services to be performed or for materials to be furnished in the State by the defendant."

III. CONSTITUTIONAL QUESTIONS PRESENTED

Jurisdiction over appellants has been sustained by the lower courts under RJA §715 (2). This statutory subsection provides that "the doing or causing any act to be done, or consequences to occur, in this State resulting in

an action for tort. . . ." creates a relationship between the state and the actor sufficient to justify the former's exercise of limited jurisdiction over the latter. In the instant case, the application of this subsection presents two principal questions:

(1) Whether the due process clause of the Fourteenth Amendment to the United States Constitution is violated by the imposition of jurisdiction over interstate motor carriers who have conducted no activities in Michigan and have not invoked the benefits and protection of Michigan laws, where such jurisdiction is based upon the single act of alleged negligent handling, in another State, of a shipment sent by plaintiffs F.O.B. Grand Haven, Michigan, causing direct injury to third persons not parties to the suit and only indirect consequences to plaintiffs domiciled in Michigan.

(2) Whether an undue burden is placed on interstate commerce by requiring a connecting interstate carrier to defend an action in Michigan, where a shipment of goods originated, based on negligent performance of interstate transportation wholly outside of Michigan, having secondary consequences in Michigan, when the shipment involved was put into the steam of commerce by plaintiffs, was transported out of Michigan by another interstate carrier, and was part of plaintiff's pattern of interstate business, when the defendants never owned or maintained property in Michigan, never operated their vehicles on any Michigan highways or had employees in Michigan and were not authorized to operate in Michigan.

IV. STATEMENT OF THE CASE

On June 2, 1965 Harold Dornbos and Beverly Dornbos, Individually and d/b/a H. J. Dornbos & Bro., a Co-partnership (herein referred to as "appellees") filed an action in tort in the Circuit Court for the County of Ottawa, State of Michigan, claiming $500,000.00 in damages from The Kroger Company, Rooks Transfer Lines, Inc., Adkins Transfer Company, Inc., Adkins Cargo Express, Inc. and Tennessee Cartage Company, Inc. Appellees are residents

of Ottawa County, Michigan and were doing business, processing, smoking, packing and selling fish in the City of Grand Haven, Michigan as H. J. Dornbos & Bro., a Co-partnership. Service of process was made on Adkins Transfer Company, Inc., Adkins Cargo Express, Inc. and Tennessee Cartage Company, Inc. (herein referred to as "appellants") in Tennessee.

The cause of action alleged by appellees is based on the negligent contamination and sale of smoked whitefish chubs arising out of the transportation by Rooks Transfer, Adkins Transfer and Tennessee Cartage and sale by the defendant Kroger Company of this product which was put into the stream of commerce by appellees from their plant at Grand Haven, Michigan and shipped to The Kroger Company, F.O.B. Grand Haven, Michigan.

Said smoked whitefish chubs were accepted for shipment and transported from Grand Haven, Michigan to Chicago, Illinois by Rooks Transfer Lines, Inc., a Michigan corporation. They were accepted from Rooks Transfer for shipment and transported from Chicago to Nashville, Tennessee by appellant Adkins Transfer Company, Inc. Local delivery only, to the Kroger Company warehouse in Nashville, was made by appellant Tennessee Cartage, Inc. Sale to the consuming public was made by The Kroger Company. The Kroger Company is an Ohio corporation which carries on a continuous and systematic general retail business throughout the United States.

Said smoked whitefish chubs were at some point and due to some cause, both of which are legally undetermined at the present stage of this proceeding, contaminated with a poisonous substance sometimes referred to as Type E botulism. The contamination of the smoked whitefish chubs caused death or serious injuries to some members of the consuming public to whom they were sold by The Kroger Company in several south central states, with attendant adverse publicity and alleged injuries to appellees.

Appellees' cause of action is in tort for damages resulting to them in Michigan from loss and destruction of business and of business reputation, with attendant mental anguish and resulting deterioration of personal health.

Appellant Adkins Transfer Company, Inc. was a corporation organized under the laws of the State of Indiana but had its principal office and place of business in Nashville, Tennessee. It also operated terminals and offices in Indianapolis, Indiana, Louisville, Kentucky and Chicago, Illinois. Adkins Cargo Express, Inc., successor to Adkins Transfer Company, Inc. is also an Indiana corporation, and has its main truck terminal and principal office in Nashville, Tennessee.

On August 9, 1965 appellants Adkins Transfer Company, Inc., Adkins Cargo Express, Inc. and Tennessee Cartage Company, Inc. filed motions and supporting affidavits to quash service of process and to dismiss the complaint against them. The grounds for this motion were:

(a) The Court lacked jurisdiction over them within the purview of Sections 711 and 715 of the Michigan Revised Judicature Act of 1961.

(b) Said statutory provisions, if they purported to permit service of process to acquire limited personal jurisdiction over appellants in those proceedings, were unconstitutional because they violated the due process of law requirement contained in the Fourteenth Amendment to the Constitution of the United States.

No question was raised concerning the jurisdiction of the Court over the subject matter of the action, the fact of proper service of process or the validity of the service of process insofar as it afforded the appellants reasonable notice and opportunity to be heard.

The affidavits in support of the motion of Adkins Transfer averred that appellant obtained a Certificate of Public Convenience and Necessity from the Interstate Commerce Commission which specifically stated that the only interstate routes over which it could operate were from Nashville via U.S. Highway 41 to Chicago, and from Nashville via U.S. Highway 31 to Louisville, to Sellersburg, Indiana, to Indianapolis and return. The affidavits of Adkins Transfer and Adkins Cargo Express, Inc., both averred that their companies had never owned or maintained property, real or personal, in the State of Michigan, nor had they operated their trucks or other vehicles

on the public roads and highways in the State of Michigan, nor had they had employees in the State of Michigan. They were common carriers of goods operating only in the states of Illinois, Indiana, Kentucky and Tennessee.

Tennessee Cartage Company, Inc. is a corporation organized under the laws of Tennessee. Its general office and principal place of business is in Nashville, Tennessee. Its certificates of convenience and necessity limit its operations to the states of Tennessee and Kentucky.

An affidavit attached to the motion to quash of appellant Tennessee Cartage stated that said company had never owned or maintained property, real or personal, in the State of Michigan, nor had it ever been authorized to and had not in fact ever operated its trucks or other vehicles on the public roads and highways in the State of Michigan, or had employees in the State of Michigan. The affidavit showed that the appellant Tennessee Cartage Company operated a *local cartage business* in Tennessee and was a common carrier of goods in the states of Tennessee and Kentucky.

Oral argument on appellants' motions to quash service and dismiss the complaint was held before Ottawa County Circuit Judge Raymond L. Smith on June 13, 1966. At that time, appellants also challenged the court's assertion of jurisdiction as an undue burden on interstate commerce in violation of Article I, §8, Clause 3 of the United States Constitution.

On September 12, 1966 the trial judge filed his opinion finding that:

(a) M.S.A. §27A.715 authorized limited personal jurisdiction of the Court over the appellants under the factual situation presented;

(b) the very nature of the business of the appellants created the constitutionally necessary "minimum contacts" with states that produce products entering the stream of commerce;

(c) the limited personal jurisdiction of the Court does not result in an undue burden on interstate commerce nor does it offend traditional notions of fair play and substantial justice;

thereby denying appellants' motion to quash service and dismiss the complaint (See Appendix A, page 21)

On September 19, 1966 defendant Kroger Company filed a counter-claim against appellees and a cross-claim against the other defendants in the amount of $4,650,000.00 for its damages, including large sums paid in settlement of numerous claims for injuries to, and the death of various customers of Kroger injured by their consumption of the poisoned fish.

On October 4, 1966 a formal order was filed denying appellants' motion to quash service of process.

On November 9, 1966 the Honorable Raymond L. Smith, Circuit Judge, certified that the order denying appellants' motions to quash service of process involves a controlling and significant question of law on which there is substantial ground for difference of opinion.

Leave to Appeal was granted and Claim of Appeal to the Michigan Court of Appeals was filed by appellants on February 17, 1967. The Michigan Court of Appeals affirmed the judgment denying appellants' motions to quash service of process. (See Appendix B, page 25).

On May 31, 1968 appellants filed in the Michigan Supreme Court an application for leave to appeal from the decision of the Court of Appeals.

On August 20, 1968, the Michigan Supreme Court denied the application for leave to appeal. (See Appendix C, page 30).

On August 23, 1968 appellants filed in the Michigan Supreme Court a motion for reconsideration of this denial

On October 30, 1968, the Michigan Supreme Court denied the motion for reconsideration. (See Appendix D, page 32).

V. SUBSTANTIAL CONSTITUTIONAL QUESTIONS ARE PRESENTED

A. The Judgment of the Michigan Supreme Court is "Final" for Purposes of Review under 28 U.S.C. §1257.

28 U.S.C. §1257 requires that judgments or decrees rendered by the highest court of a state be "final" before they

can be reviewed on appeal to the United States Supreme Court. The final judgment rule is one of administration. The classic justification for the finality requirement is that it precludes premature and piecemeal review, thereby promoting efficient use of the judicial machinery and avoiding unnecessary, costly and dilatory interlocutory appeals. Three recent decisions of this Court have established, however, that "finality" under 28 U.S.C. §1257 is not a mechanical concept requiring a final adjudication of the merits in each case as a prerequisite to appellate consideration. Instead, "finality" must be given a practical meaning in light of the policies sought to be enforced.

In *Local 438 Construction Laborers' Union v. Curry*, 371 US 542 (1963), the Georgia Supreme Court had granted an interlocutory injunction against union picketing alleged by the plaintiff to be in violation of the Georgia right-to-work act. They had rejected the union's contention that the subject matter of the dispute was within the exclusive jurisdiction of the National Labor Relations Board. On appeal to the United States Supreme Court, this judgment was held to be "final" within the meaning of 28 U.S.C. §1257, although the jurisdictional issue would have merged with the merits and been ultimately reviewable in the United States Supreme Court after a trial was held.

In *Mercantile Nat'l Bank v. Langdeau*, 371 US 555 (1963), a complaint was filed in the state courts of Texas against a national bank. The national bank filed a plea of privilege, as provided by the Texas Rules of Civil Procedure, asserting that it was immune from suit in the state courts under the provisions of 12 U.S.C. §94. Their plea was denied. The United States Supreme Court held this denial to be "final" under 28 U.S.C. §1257, and an appeal was allowed. The Texas court ruling on venue could have been considered preliminary, Appeal was allowed however, because the effect of the ruling was to require a "totally unnecessary trial", (15 L ed 2d at 42) and the federal right asserted by the national bank was precisely one not to stand trial in the state court where the complaint had been filed.

Finally, in *Rosenblatt v. American Cyanamid Co.*, 15 L ed 2d 39 (1965), Justice Goldberg, in chambers, concluded that

the denial of a defendant's before trial motion to dismiss a complaint on the ground that the state court's assertion of in personam jurisdiction violated the due process clause of the Fourteenth Amendment to the Constitution of the United States was a "final" judgment for purposes of review under 28 U.S.C. §1257.

These three cases estabilsh that when substantive rights are effectively determined by an interlocutory order or where protracted and costly proceedings are dependent on these orders, postponing review until there has been a final adjudication is not in the interest of either courts or litigants. In each case there had been: (1) a threat of serious erosion of national policy (federal pre-emption of labor disputes, special venue for national banks and the due process right against subjection to excessive state assertions of in personam jurisdiction); and (2) a state judgment on an issue anterior to and separable from the merits, not enmeshed in the factual controversies of the case. These cases recognize that "finality applied inexorably . . . may be self defeating and in conflict with more important policies." Note, *The Requirement of a Final Judgment or Decree for Supreme Court Review of State Courts.* 73 YALE L.J. 515 (1964).

Appellants challenge the imposition of jurisdiction in this case under both the due process clause of the Fourteenth Amendment and the interstate commerce clause of the United States Constitution. These issues were raised at the pre-trial stage in a motion to quash service of process and dismiss the complaint. The Ottawa County Circuit Court, followed by the Michigan Court of Appeals, held that M.S.A. §27A.715 (2) as construed in this case and applied to this defendant was constitutionally applied. Appellants then applied to the Michigan Supreme Court for leave to appeal. Their motion was denied, without prejudice.

The effect of these proceedings will be to require appellants to undergo a long, complex and costly trial of the factual and legal issues presented in this case before they can obtain a definitive decision on the substantial constitutional issues raised by the imposition of jurisdiction by the Michigan courts. In addition to plaintiffs' claims for

damages, the trial will involve over five million dollars in claims and cross-claims and the consideration of numerous separate settlements made by or judgments obtained against cross-claimant The Kroger Company, which is seeking indemnification from appellants as well as damages for injury to its business reputation and loss of profits. The settlements were negotiated with individuals throughout the South Central United States who brought court actions alleging death or injury by the consumption of contaminated fish distributed by the plaintiffs and defendant Kroger.

As in *Rosenblatt*, the jurisdictional issue in this case is separate from and anterior to the merits, so as to be susceptible of independent review. Appellants have a substantial claim that national policies against subjection to excessive assertions of in personam jurisdiction and against the creation of undue burdens against interstate commerce will be violated by the exercise of jurisdiction in this case. These constitutionally protected rights have little substantive meaning if they can be challenged only after a costly and protracted trial of numerous separate and distinct claims in the state court. In a case of this magnitude and complexity, a before-trial review of the jurisdictional issue will promote the efficient and equitable administration of justice, and the traditional restrictions on interlocutory appeals from state courts are out-weighed by considerations of fairness to appellants, appellees and the trial court. If due process and the right to be free from undue burdens on interstate commerce have any meaning as constitutional protections against harassing, burdensome, complex and costly litigation in distant forums, appellants are entitled to a review of the separate jurisdictional issue at this stage of the proceeding.

Because the Michigan Supreme Court denied appellants' application for leave to appeal "without prejudice," it can, presumably, rule on the constitutional challenges to its jurisdiction if the case is again brought before it on an appeal after a trial on the merits. Its present decision, however, finally and unequivocally determines that appellants are to be subjected to a long and costly trial in the courts of Michigan. The thrust of *Rosenblatt, Curry* and

Langdeau cannot be destroyed by a state court judgment rendered "without prejudice". "Without prejudice" is a hollow phrase. If appellants can prevail on their constitutional challenges to the jurisdiction of the Michigan courts only after a long and expensive trial, the constitutional guarantees are crucified. A subsequent right to appeal cannot resurrect those guarantees. The national policies embodied in appellants' constitutional claims are eroded as deeply as if the judgment of the Michigan Supreme Court had been entered with prejudice. Finality has received and should receive a practical construction so the rights guaranteed by the United States Constitution to these appellants will have substantive meaning and effect.

We conclude that the Michigan Supreme Court has determined that the Michigan long-arm statute supports jurisdiction and is not repugnant to the United States Constitution, thus requiring appellants to defend a complex and protracted trial of numerous claims at great time and expense in the courts of the State of Michigan. Their decision, therefore, is subject to review under 28 U.S.C. §1257 (2), pursuant to the principles set forth in *Rosenblatt*, *Curry* and *Langdeau*.

B. The Imposition In Personam Jurisdiction over Appellants Violates the Due Process of Law Requirement of the Fourteenth Amendment to the United States Constitution.

This century has seen a gradual extension of state court power over persons normally found beyond the political boundaries of the state. This development was ushered along by the automobile and the non-resident motorist statutes designed to provide redress for citizens injured by non-residents who voluntarily drove within the forum state. See *Hess v. Pawloski*, 274 US 356 (1927).

International Shoe Co. v. Washington, 326 US 310 (1945), articulated a new standard of reasonableness measured by "minimum contacts" of the defendant with the forum state.

> "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." 326 US 316.

The Court indicated the type of minimum contacts that must be examined and found present.

> "But to the extent that a corporation exercises the privilege of conducting *activities within a state*, it enjoys the *benefits and protection of the laws of that state*. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the *activities within the state*, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." (Emphasis added.) 326 US at 319.

It is significant that the Court looked to the benefits, protections and obligations of the non-resident with respect to the laws of the forum state.

McGee v. International Life Ins. Co., 355 US 220 (1957) is another landmark decision in the expansion of jurisdiction within constitutional limitations. Although the defendant in that case had no offices or employees in California, the Court held that California had the power to exercise jurisdiction over the defendant in an action brought by a California resident upon an insurance policy issued by the defendant.

> "It is sufficient for purposes of due process that the suit was based on a *contract* which had *substantial* connection with that State." (Emphasis added) 355 US at 223.

The crucial connections were delivery of the contract in California, mailing the premiums in California, and residence of the insured in California. See 355 US at 223. Additional, compelling reasons for exercising jurisdiction in *McGee* were the facts that the insurance contract was

made in California, the state had enacted special legislation to protect its citizens against abuse by insurance companies not authorized to do business in California, and, traditionally, states have regulated and controlled insurance businesses conducted within their borders.

Hanson v. Denckla, 357 US 235 (1958) held that the state of Florida could not constitutionally exercise jurisdiction over a Delaware trust company in a proceeding to determine the validity of a trust even though the settlor of the trust (1) was a resident of Florida when she died (although not when she created the trust), (2) had exercised a power of appointment while in Florida, and (3) had received income of the trust through checks mailed to her Florida address by the Delaware trustee. *Hanson* reveals definite limitations on state-court jurisdiction asserted by reason of isolated contacts between the forum and the defendant. Chief Justice Warren pointed to a crucial element found in *McGee,* but absent in *Hanson* — a voluntary action performed or consummated *within* the forum.

> "The cause of action in this case is not one that arises out of an *act done* or transaction consummated *in the forum State.* In that respect, it differs from McGee v. International Life Insurance Co. . . ." (Emphasis added.) 357 US 251.
>
> "This suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised *in Florida.*" (Emphasis added.) 357 US 252.
>
> "It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities *within the forum* state, thus *invoking the benefits and protections of its laws.* International Shoe Co. v. Washington, 326 US 310, 319." (Emphasis added.) 357 US at 253.

Thus, from *International Shoe Co. v. Washington, supra,* to *Hanson v. Denckla, supra,* this Court has made it clear that jurisdiction over non-residents is constitutionally

supportable only when a quid pro quo was *sought by the non-resident* in the form of *benefits and protections* of the forum's laws. These principles were most recently reaffirmed and restated by Justice Goldberg, in chambers, in *Rosenblatt v. American Cyanamid Co.*, 15 L. ed 2d 39 (1965).

The Ottawa County Circuit Court and the Michigan Court of Appeals rejected appellants' due process challenge to their jurisdiction by improperly applying the "minimum contacts" standard enunciated in *International Shoe Co. v. Washington*, supra. Appellants Adkins' only connection with the State of Michigan was through the acceptance of Michigan products in Chicago, Illinois, from another common carrier. Appellant Tennessee Cartage's only connection was its acceptance and delivery of the interstate shipment of fish locally, in Nashville. This tenuous relationship with the State of Michigan led the lower courts to conclude that the nature of appellants' business is such that "they are required to carry goods solicited by *others* with whom they have a business relationship and *who have a direct relationship* with the forum state". (Emphasis added.) The lower courts concluded that this single, indirect contact by other shippers, satisfied the constitutional minimum.

The product was introduced into the stream of commerce in Michigan by appellees, H. J. Dornbos & Bro., plaintiffs below, from their plant at Grand Haven, Michigan. Appellants did not carry the fish into Michigan or participate in any shipment of a product into Michigan.

Further, Dornbos shipped to appellee The Kroger Company, F.O.B. Grand Haven, Michigan. Title passed to Kroger by the action of Dornbos, at Grand Haven, and Appellants therefore were transporting Kroger's fish at Kroger's expense, making these appellants' connection with Dornbos, plaintiffs herein, even more tenuous.

Appellants did not seek, nor could they have availed themselves of, the protection of the laws of the State of Michigan. They never set foot in Michigan, performed

services in Michigan or sent agents or employees into Michigan.

Whatever commercial opportunities were enjoyed by appellants were conferred by the Interstate Commerce Commission, not by the State of Michigan, who could not and did not bestow such benefits.

Appellants engaged in absolutely no activities within the State of Michigan and they had no connection with the State which could be said to invoke the "benefits and protections of its laws". *Hanson v. Denckla,* supra, at 253. Neither lower court decision cited *Hanson v. Denckla.* Their failure to consider the impact of this decision was erroneous. They chose to rely upon *Gray v. American Radiator & Standard Sanitary Corp.,* 176 NE 2d 761 (Ill. 1961), a products liability case in which the defendant voluntarily placed its product in the stream of commerce which eventually carried the product into the state of Illinois. By utilizing the reasonable, volitional presumption of foreseeability, the court could conclude that the defendant purposefully availed itself of the benefits and protections of the laws of Illinois. In a products liability case, the defendant is typically a commercial enterprise which initiated the disputed transaction and the plaintiff is an individual consumer, thus presenting equities far different from those in the present case. In the present case, *plaintiffs-appellees* Dornbos were the ones who sent Kroger's fish to appellants Adkins in Chicago, Illinois for delivery to Kroger in Tennessee. Plaintiffs-appellees *themselves* instigated the chain of events which neither contemplated nor required any activity by appellants in Michigan. Moreover, appellant Tennessee Cartage merely made the *local* delivery to Kroger, in Nashville, of Kroger's fish.

In recognition of the complexities presented in this case, the Honorable Raymond L. Smith, Circuit Judge, whose opinion was the basis for the later opinion of the Michigan Court of Appeals, certified that his order denying appellants' motions to quash service of process involved a controlling and significant question of law on which there is substantial ground for difference of opinion.

Hanson v. Denckla, supra, with the exception of *Rosenblatt v. American Cyanamid Co.,* supra, is the last United States Supreme Court decision delineating the outposts and boundaries of jurisdiction by state courts. There is hopeless confusion as to whether *Hanson* asserts general guidelines to jurisdiction or should be limited to its facts. *E.g., Trippe Mfg. Co. v. Spencer Gifts, Inc.,* 270 F. 2d 821, 822 (7th Cir 1959); *Hearne v. Dow-Badische Chemical Co.,* 224 F. Supp 90 (S.D. Tex. 1963); *Roy v. North American Newspaper Alliance, Inc.,* 205 A. 2d 844 (N.H. 1964). Compare LeFlar, *Conflict of Laws,* 34 N.Y. U.L. REV. 20, 33 (1959) with Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois,* 1963 Ill. L. FORUM 533 and Carrington and Martin, *Substantive Interests and the Jurisdiction of State Courts,* 66 MICH L REV. 227 (1968). See also Note, *Due Process and Foreign Corporations — The Minnesota Single Act Statute,* 50 MINN L. REV. 946 (1966); Note, *Jurisdiction: Construction of "Tortious Act" in New York's Long-Arm Statute,* 66 COLUM. L. REV. 199 (1966).

If limited personal jurisdiction is constitutionally permissible in this situation, a significant step beyond *Hanson v. Denckla* has been taken. This may or may not be a legitimate undertaking. These appellants assert that it is not. Before any such step is permitted, however, this Court should consider and pass upon this very substantial question affecting all forms of transportation engaged in interstate commerce and, in the process, eliminate the confusion surrounding the interpretation of its prior decisions.

C. The Imposition of In Personam Jurisdiction over Appellants Constitutes an Undue Burden on Interstate Commerce in Violation of Article I, Sec. 8, Clause 3 of the United States Constitution.

Appellants are connecting carriers engaged exclusively in interstate commerce within a geographic area carefully restricted and defined by Certificates of Public Convenience and Necessity issued by the Interstate Commerce Com-

mission. Their statutory duty is to accept and transport goods over specified routes when goods are presented to them for such service. Their duty exists without regard to the origin or the destination of the products. Further, this is an obligation imposed by *federal* law. 49 U.S.C. §301 et. seq. It is not a right, duty or privilege emanating from the law of any state. It most certainly is not a privilege that can be granted or withheld by Michigan law, or that traditionally has been regulated by the state.

The lower court decisions would require a connecting carrier who has transported goods for a portion of their interstate travel to defend an action brought in the forum of the shipper's residence, however distant, if alleged negligent performance of the transportation is said to adversely affect the shipper. Such a requirement exposes a carrier to potential harassment and frivolous claims in distant forums. If the requirement stands, the interstate carrier cannot know the jurisdictions in which it must be prepared to defend its conduct. Despite the fact that the *shipper* has voluntarily decided to expose his product to interstate markets with full knowledge of its itinerary it is the *carrier* that is subjected to litigation at the *shipper's* convenience. A connecting or delivering carrier could be required to defend an action in a forum which would apply law other than its own, and to which witnesses could not be compelled to travel. It is realistic to expect that interstate service would be disrupted by the absence of key personnel involved in such litigation. This is a commercially unreasonable and intolerable burden on interstate commerce.

Davis v. Farmers' Co-op Equity Co., 262 US 312 (1923) is an historic decision where assumption of jurisdiction was held to be an unreasonable burden on interstate commerce. In *Davis*, the Court struck down a statute requiring a foreign corporation to submit to jurisdiction in Minnesota on a cause of action arising wholly outside the state and brought by a non-resident plaintiff even though the corporation maintained an agent in Minnesota who

solicited interstate business. *Davis* clearly holds that even solicitation of business within a jurisdiction by a business engaged exclusively in interstate commerce cannot alone be a basis for state court jurisdiction without violating the interstate commerce clause. While the years since the *Davis* decision have seen expanded concepts of jurisdiction develop under the due process clause, *Davis* has not been overruled, and recent decisions have demonstrated its current vitality. *E.g., Hershel v. Pennsylvania R.R. Co.*, 334 Mich. 148, 54 NW 2d 286 (1952); *White v. Southern Pacific Co.*, 386 SW 2d 6 (Mo. 1965); *Glaser v. Pennsylvania R.R.*, 82 N.J. Super 16, 196A.2d 539 (1963); *Erlanger Mills v. Cohoes Fibre Mills*, 239 F.2d 502 (4th Cir. 1956).

Because appellants are engaged exclusively in interstate commerce, attenuated contacts such as exist in this case are insufficient to sustain personal jurisdiction. *Cf. Curtis Pub. Co. v. Butts*, 338 US 130, 153 (1967); *Buckley v. New York Times Co.*, 338 F.2d 470 (5th Cir. 1964); *New York Times Co. v. Connor*, 365 F.2d 567 (5th Cir. 1966) (Presence of first amendment considerations required greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity). Whereas the due process clause is concerned primarily with fairness to the individual and protection against unreasonable interference in a specific situation, the commerce clause is designed to facilitate and assist the development and functioning of transportation and business activity generally in a federal system. The public at large, as well as all those engaged exclusively in interstate commerce, have a considerable interest in determining the constitutional validity of jurisdiction in this case, with its resulting expense, inconvenience and interruption of service to the public. The threat to appellants and to other interstate carriers similarly situated poses a unique and substantial question which deserves a review by the United States Supreme Court.

VI. CONCLUSION

Wherefore, it is respectfully submitted that this Court has jurisdiction of this appeal under Section 1257 (2), Title 28, United States Code.

Respectfully submitted,

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APPENDIX A

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OTTAWA

HAROLD DORNBOS and BEVERLY DORNBOS, Individually and d/b/a H. J. DORNBOS & BROS., a Co-Partnership,
Plaintiffs,
vs.

OPINION
File No. 615

THE KROGER COMPANY; ROOKS TRANSFER LINES, INC.; ADKINS TRANSFER COMPANY, INC.; ADKINS CARGO EXPRESS, INC.; and TENNESSEE CARTAGE COMPANY, INC.,
Defendants.

Defendant Adkins Transfer Company, Inc., Adkins Cargo Express, Inc., and Tennessee Cartage Company, Inc., move the court, pursuant to GCR 116, to quash service of process and dismiss the complaint for lack of jurisdiction. Their motions challenge the application and constitutionality of Michigan's "Long-Arm" statute, being Chapter 7 of the Revised Judicature Act (Stat. Ann. Sec. 27A. 701 et seq).

The complaint alleges that plaintiff shipped a quantity of smoked fish F.O.B. to defendant Kroger in Tennessee, that defendant Rooks picked them up in Michigan and carried them to Chicago where defendant Adkins picked them up and carried them to Tennessee where defendant Tennessee Cartage Company, Inc., picked them up and delivered them to Kroger. Alleging negligence in handling their product so that the fish became the cause of death when eaten with consequential adverse publicity for plaintiff and proximately resulting damages, this action is brought in Ottawa

County, Michigan, residence of plaintiff, against all the defendants. Service against the moving defendants was had in Tennessee.

MSA 27A.715(2) provides as follows:

> "The existence of any of the following relationships between a corporation or its agent and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise limited personal jurisdiction over such corporation and to enable such courts to render personal judgments against such corporation arising out of the act or acts which create any of the following relationships:
>
> (2) The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort."

Note must be taken that this section of the Judicature Act is carefully circumscribed and limited to acts outside the State which have consequences inside the State. Former restricted concepts of jurisdiction over non-resident foreign corporations have been expanded by the case of International Shoe Company vs. State of Washington, 326 U.S. 310 (1945) where it was stated:

> "Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. . . . . .

> It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit and those which do not, cannot be simply mechanical or quantitative. The test is not whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or little less. Whether due process is satisfied must depend rather upon the *quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.* That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations."

The court directs its attention to the "quality and nature" of the activity of these defendants as it relates to the State of Michigan. These defendants are in the business of carrying goods in interstate commerce. It is reasonable to assume that they solicit and hopefully anticipate such business. They are in the position of being able to protect themselves from the consequences of their own derelictions. They understand that the nature of their business requires them to have the care and custody of the products and possessions of residents of other states. It is foreseeable that their negligent handling of these products and possessions may have tortious consequences in other states.

It is no defense to claim that these defendants did not come into the State of Michigan to solicit this business when the very nature of their business and their franchise is such that they are required to carry goods solicited by others with whom they have a business relationship and who have a direct relationship with the forum state. Without delving into the agency concepts that may be present here, suffice it to state that the very nature of the business of these defendants creates the necessary minimum contacts with those states which produce the products that enter interstate commerce. This court is unable to

see any difference in this situation from the case of Gray vs. American Radiator & Standard Sanitary Corporation, 176 N.E. 2nd 761 (Ill. 1961). In Gray we have a negligently manufactured component which reaches the State of Illinois, while in the case before this court we have the claim of a negligently performed service with tortious consequences in either event.

The court's thinking is guided by McGee vs. International Life Insurance Company, 355 U.S. 220 (1957) wherein it is stated:

> ". . . . In a continuing process of evolution this Court accepted and then abandoned 'consent', 'doing business', and 'presence' as the standard for measuring the extent of state judicial power over such corporations. . . . ."

The court rejects any argument that such a result will be an undue burden on interstate commerce or will offend, "traditional notions of fair play and substantial justice". The realities of modern commercial transactions dictate that modern concepts of jurisdiction be considered for the purpose of enlightened handling of disputes arising from modern conditions and transactions. Shall we hold that there can only be fair play and substantial justice where the law provides that all those who do business with these defendants must go to those states wherein they are doing business for adjudication of their grievances rather than to hold that the forum of justice may be that state where tortious consequences occur? To ask the question is to answer it. The court finds nothing offensive to the concept of fair play and justice in holding that the claimant may resort to the forum where the consequences of an act occurs.

The motions to dismiss are denied.

Dated: September 12, 1966.

(s) Raymond L. Smith
Circuit Judge

APPENDIX B

Mar 19 1968

STATE OF MICHIGAN
COURT OF APPEALS
DIVISION 3

HAROLD DORNBOS and BEVERLY DORNBOS, individually and d/b/a H. J. DORNBOS & BROS., a copartnership,
Plaintiffs-Appellees,
v.
No. 2984

THE KROGER COMPANY and ROOKS TRANSFER LINES, INC.,
Defendants,

and

ADKINS TRANSFER COMPANY, INC.; ADKINS CARGO EXPRESS, INC. and TENNESSEE CARTAGE COMPANY, INC.,
Defendants-Appellants.

BEFORE: Fitzgerald, P.J., Burns and Holbrook, J.J.

BURNS, J.

Defendants-appellants on leave granted by this Court appeal an order of the Ottawa circuit court denying their motion to dismiss plaintiffs' complaint for lack of jurisdiction.

Plaintiffs are residents of Ottawa county, Michigan, doing business in the city of Grand Haven as H. J. Dornbos & Bros., a copartnership. Defendant Kroger Company is a corporation organized under the laws of Ohio and doing business in the state of Michigan. Defendant Rooks

Transfer Lines, Inc., is a corporation organized under the laws of Michigan with its principal office in the city of Holland, county of Ottawa, state of Michigan. Defendant Adkins Transfer Company is a corporation organized under the laws of the state of Indiana and is a common carrier in interstate and intrastate commerce with terminals in Chicago, Illinois, and Nashville, Tennessee. Defendant Adkins Cargo Express is a corporation organized under the laws of the state of Indiana and is a successor to the Adkins Transfer Company. Defendant Tennessee Cartage Company is a corporation organized and existing under the laws of the state of Tennessee and is a common carrier in the state of Tennessee.

Plaintiff alleged in their complaint that in September, 1963, plaintiffs were engaged in the business of processing and selling fish products. They received an order from the Kroger Company from its Nashville, Tennessee office for smoked fish, f.o.b. Grand Haven. The fish were sealed in vacuum packages marked, "Keep under refrigeration." On September 19, 1963, the fish were picked up by Rooks and transferred to Adkins at Chicago, Illinois, which, in turn, transported the fish to Nashville, Tennessee. In Nashville the fish were turned over to Tennessee Cartage which delivered the fish to the Kroger warehouse on September 25, 1963.

Plaintiffs further alleged that due to negligence in the handling of the product the fish became contaminated and caused death when eaten, with consequential adverse publicity for plaintiffs and the resulting damages for which the action was brought in Ottawa county, Michigan.

Defendants Adkins Transfer Company, Adkins Cargo Express and Tennessee Cartage Company moved the circuit court to quash service of process and dismiss the complaint for lack of jurisdiction, as the moving parties were served with process in the state of Tennessee. The motions challenged the application and the constitutionality of Michigan's "long arm" statute, the revised judicature act, PA 1961, No. 236, CLS 1961, § 600.715 (Stat Ann 1962 Rev § 27A.715). The circuit judge denied the motion to dismiss the complaint.

The defendants claim the circuit court erred in that its decision:

1) violated the due process law requirement of the 14th amendment of the United States Constitution;

2) places an undue burden on interstate commerce.

CLS 1961, § 600.715 (Stat Ann 1962 Rev § 27A.715) provides as follows:

> "The existence of any of the following relationships between a corporation or its agent and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise limited personal jurisdiction over such corporation and to enable such courts to render personal judgments against such corporation arising out of the act or acts which create any of the following relationships: * * *
>
> "(2) The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort."

The trial judge in a written opinion which we adopt stated in part:

> "Note must be taken that this section of the judicature act is carefully circumscribed and limited to acts outside the state which have consequences inside the state. Former restricted concepts of jurisdiction over nonresident foreign corporations have been expanded by the case of *International Shoe Company v. State of Washington* (1945), 326 US 310, 316, 319 (66 S Ct 154, 90 L ed 95, 161 ALR 1057) where it was stated:
>
> " 'Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. * * * But now that the capias ad respon-

dendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." * * *

" 'It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or little less. * * * Whether due process is satisfied must depend rather upon the *quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.* That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.' (Emphasis supplied by circuit judge.)

"The court directs its attention to the 'quality and nature' of the activity of these defendants as it relates to the state of Michigan. These defendants are in the business of carrying goods in interstate commerce. It is reasonable to assume that they solicit and hopefully anticipate such business. They are in the position of being able to protect themselves from the consequences of their own derelictions. They understand that the nature of their business requires them to have the care and custody of the products and possessions of residents of other states. It is forseeable that their negligent handling of these products and possessions may have tortious consequences in other states.

"It is no defense to claim that these defendants did not come into the state of Michigan to solicit this business when the very nature of their business and their franchise is such that they are required to carry goods solicited by others with whom they have a business relationship and who have a direct relationship with the forum state. Without delving into the agency concepts that may be present here, suffice it to state that the very nature of the business of these defendants creates the necessary minimum contacts with those states which produce the products that enter interstate commerce. This court is unable to see any difference in this situation from the case of *Gray v. American Radiator & Standard Sanitary Corporation* (1961), 22 Ill 2d 432 (176 NE 2d 761). In *Gray* we have a negligently manufactured component which reaches the state of Illinois, while in the case before this court we have the claim of a negligently performed service with tortious consequences in either event.

"The court's thinking is guided by *McGee v. International Life Insurance Company* (1957), 355 US 220, 222 (78 S Ct 199, 2 L ed 2d 223) wherein it is stated:

" 'In a continuing process of evalution this Court accepted and then abandoned "consent", "doing business", and "presence" as the standard for measuring the extent of state judicial power over such corporations.'

"The court rejects any argument that such a result will be an undue burden on interstate commerce or will offend, 'traditional notions of fair play and substantial justice'. The realities of modern commercial transactions dictate that modern concepts of jurisdiction be considered for the purpose of enlightened handling of disputes arising from modern conditions and transactions. Shall we hold that there can only be fair play and substantial justice where the law provides that all those who do business with these defendants must go to those states wherein

> they are doing business for adjudication of their grievances rather than to hold that the forum of justice may be that state where tortious consequences occur? To ask the question is to answer it. The court finds nothing offensive to the concept of fair play and justice in holding that the claimant may resort to the forum where the consequences of an act occur."

This Court is aware of the decision by our Supreme Court in *Hershel Radio Co. v. Pennsylvania R. Co.* (1952), 334 Mich 148. However, that case was decided prior to the revised judicature act. To follow that holding in the present case this Court would have to declare this section of the act invalid as to interstate carriers. This we decline to do. Statutes are presumed to be constitutional.

Judgment affirmed. Costs to appellees.

APPENDIX C

(Supreme Court Number 52062)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 20th day of August in the year of our Lord one thousand nine hundred and sixty-eight.

Present the Honorable

John R. Dethmers,
Chief Justice,
Harry F. Kelly,
Eugene F. Black,
Thomas M. Kavanagh,
Michael D. O'Hara,
Paul L. Adams,
Thomas E. Brennan,
Associate Justices.

On order of the Court, the application by defendants and appellants for leave to appeal is considered, and the same is hereby DENIED, without prejudice, for the reason that it does not present a meritorious question for review at this before-trial stage of the cause.

Adams, J., not participating.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 20th day of August in the year of our Lord one thousand nine hundred and sixty-eight.

(SEAL)

(s) Donald F. Winters,
Clerk.

APPENDIX D

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 30th day of October in the year of our Lord one thousand nine hundred and sixty-eight.

Present the Honorable

John R. Dethmers,
Chief Justice,

Harry F. Kelly,
Eugene F. Black,
Thomas M. Kavanagh,
Michael D. O'Hara,
Paul L. Adams,
Thomas E. Brennan,
Associate Justices.

On order of the Court, the motion by defendants and appellants for reconsideration of their application for leave to appeal is considererd, and the same is hereby DENIED.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 30th day of October in the year of our Lord one thousand nine hundred and sixty-eight.

(SEAL)

(s) Harold Hoag
Deputy Clerk.

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IN THE

Supreme Court of the United States

No. 736

OCTOBER TERM 1968

ADKINS TRANSFER COMPANY, INC.,
ADKINS CARGO EXPRESS, INC., and
TENNESSEE CARTAGE COMPANY, INC.
Appellants,

vs.

HAROLD DORNBOS and BEVERLY DORNBOS,
Individually and d/b/a H. J. DORNBOS, &
BRO., a Co-Partnership
and
THE KROGER COMPANY and ROOKS
TRANSFER LINES, INC.,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

MOTION TO DISMISS APPEAL

(For List of Attorneys, see Inside Front Cover.)

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WO. 2-8745—WO. 2-8732

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IN THE

Supreme Court of the United States

No. .....

OCTOBER TERM 1968

ADKINS TRANSFER COMPANY, INC.,
ADKINS CARGO EXPRESS, INC., and
TENNESSEE CARTAGE COMPANY, INC.
Appellants,
vs.
HAROLD DORNBOS and BEVERLY DORNBOS,
Individually and d/b/a H. J. DORNBOS, &
BRO., a Co-Partnership
and
THE KROGER COMPANY and ROOKS
TRANSFER LINES, INC.,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

MOTION TO DISMISS APPEAL

Appellee moves the Court to dismiss the appeal herein on the following grounds:

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE APPEAL

I. THE APPELLANT CLAIMS THE IMPOSITION OF IN PERSONAM JURISDICTION OVER APPELLANTS VIOLATES DUE PROCESS OF LAW REQUIREMENTS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellants claimed they would be denied the due process of law if they are subjected to the jurisdiction of Michigan Courts because they do not have minimum contacts with the forum state.

Appellants contends that their only connection with the state of Michigan was through the acceptance of Michigan products in Chicago, Illinois, from another common carrier. (Appellants' Jurisdictional Statement p. 15). Appellant Tennessee Cartage Company claims its only connection was its acceptance and delivery of the interstate shipment of fish locally, and Nashville. (Appellants' Jurisdictional Statement p. 15).

The basis for exercising jurisdiction of Michigan Courts over the appellants was stated in the Michigan Court of Appeals' Opinion appearing in Appendix B of Appellants' Jurisdictional Statement, page 27. The statutory basis is found in Michigan Compiled Laws Supplement 1961, 600.-715 (Mich Stat Ann 1962 Rev §27A.715) which provides as follows:

> "The existence of any of the following relationships between a corporation or its agent and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise limited personal jurisdiction over such corporation and to enable such court to render personal judgment against such corporation arising

> out of the act or acts which create any of the following relationships: * * *
>
> (2) The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort."

It was found by the trial court and affirmed by the Court of Appeals that the act of accepting Michigan products and shipping them were of such a quality and nature that the assertion of limited personal jurisdiction over the appellants would not violate due process.

Appellants in their Jurisdictional Statement, page 6, state as follows:

> "No question was raised concerning the jurisdiction of the Court over the subject matter of the action, the fact of proper service of process or the validity of the service of process insofar as it afforded the appellants reasonable notice and opportunity to be heard."

It is therefore reasonable to assume that appellants do not contend that a violation of due process will arise because they were not given proper notice or an opportunity to defend. The argument would be, instead, that due process would be violated because they must appear in a Michigan Court.

The decisions of this court and case law throughout the United States interpreting various "long-arm statutes" make it clear that the Michigan statute does not violate due process of law.

Appellants provide a service. This service enters the stream of commerce as surely as any product enters the stream of commerce. Negligent performance of these services could most reasonably be foreseen to have repercussions

or consequences in states other than where the service is performed. Appellants acted as connecting carriers. They accepted goods F.O.B. from Michigan to Kroger in Tennessee. The service is not one of merely transporting goods within a limited territory but it is a service that must be viewed in the over all context of the function of this service. The function of this service was to transport plaintiff's product from Michigan to Tennessee. Appellants should be answerable for any negligent acts in the transporting of the goods.

Appellants cannot argue that they could not know, or could not reasonably be expected to know, that their acts, if wrongful would have potential consequences in Michigan. The appellants could reasonably be held to foresee that their acts might result in an injury or damage in the state of Michigan.

The Michigan "long-arm statute" was not enacted without considerable deliberation and thought on the part of our legislature. Other jurisdictions and other courts have analyzed similar problems and similar statutes and have held them to be constitutional.

The law is quite clear in this area and certainly does not present a substantial constitutional question.

Aside from the fact that the clear language of the Statute indicates that the appellants are subject to the jurisdiction of the Courts of this State, recent case law indicates that specific legislative authority is not necessary to enable courts to exercise jurisdiction over non-residents and is only limited by due process.

In *St. Clair v. Righter,* 250 Fed Supp 148 (W.D. Va., 1966), it is pointed out by the Court that Virginia's Long Arm Statute requires additional factors other than simply a tortious injury to confer limited *in personam* jurisdiction

over the appellants. However, the Virginia court clearly indicates that:

> "A long arm statute is merely legislative approval for the exercise by the courts in that state of their inherent jurisdictional power *at least* to the limits set out in the statute. It goes without saying that the mere fact that the legislature has passed a statute does not permit an extension of jurisdiction beyond the due process limits even if authorized by the legislation. Conversely, if the limits of the state jurisdiction as set out in the statute fall well within the scope of due process, this does not *restrict* the courts and prohibit them from extending their jurisdiction to the limits of due process even if such an assumption of latent power is not expressly authorized by statute. This necessarily follows from the fact that jurisdiction is a question of power which is ultimately defined by due process and not by state legislation" (p. 152).

Michigan has the legislative authority to assert limited *in personam* jurisdiction over appellants. C L S 1961, §600.715 (Stat Ann 1962 Rev §27A.715). The statute clearly indicates that the appellants are included. No acts need be done by the appellants in the State and, by the clear wording of the Statute, it is not essential that the appellants "purposely avail" themselves of the privilege of conducting activities within this State.

It is the position of the appellee Kroger that the Statute covers the instant situation and even if it does not, the inherent power of the courts to exercise jurisdiction would extend to the appellants under the fact situation as presented.

The appellants admit that acts of negligence resulting in injury to the plaintiffs occurred in Nashville (Appellants' Brief, Michigan Court of Appeals, p. 21).

The Michigan "long arm" Statute clearly makes these acts or act by appellants one of the bases for subjecting them to limited *in personam* jurisdiction of the Michigan Courts.

Although the appellants allege the extent of the injuries suffered are not sufficient to subject them to Michigan law, the material factor for consideration is not the extent of the injuries, but the fact that the defendant-appellants caused consequences to occur which resulted in an action for tort.

It is essential for the existence of judicial jurisdiction that the cause of action arise out of the act done, or the consequences of an act or acts occurred, in the state. This condition is present in the instant case. The defendants-appellants are not being asked to defend themselves because of single, isolated acts, unrelated to the present cause of action. Their acts caused the consequences; namely, the injuries alleged by the plaintiff herein, and these consequences are the bases for bringing the cause of action against the defendants-appellants in the Courts of Michigan. *Nationwide Motorist Association of Michigan v. Nationwide Motorist Association,* 244 F Supp 490, 493 (D.C. Mich., 1965).

Due process would not be violated if the appellants are required to defend themselves in a limited *in personam* action in the state wherein a tortious injury has already resulted from acts or omissions caused by the appellants.

The State of Michigan has a great interest in, and significant contacts with this situation, making it reasonable to assert personal jurisdiction over these defendants.

Interposing "Michigan" in the place of "Virginia" in the statement made by the court in *St. Clair v. Righter,*

supra, the following can be found equally valid in this state:

> "(Michigan) as the forum state place of injury can quite validly desire to fix the measure of protection to which each person injured within the state is entitled against his fellows and determine whether the damage was wrongfully inflicted, thus giving rise to a cause of action in tort. This interest is rendered even more substantial by the fact that the plaintiff in this case is a domiciliary of (Michigan)." (p. 154)

Recent cases indicate the jurisdiction test to be applied in determining the *proper forum* will be a consideration of the most convenient forum. *Metal Matic, Inc. v. Eighth Judicial District Court,* 415 P 2d 617 (1966 Nevada).

It would not be unfair or a violation of due process to subject the defendants-appellants to limited *in personam* jurisdiction in this case, since it is a substantial probability that under a conflict of laws rule, that the law of Michigan would be applied in this case, regardless of where the suit was brought. Generally, the law of the place of the injury governs the right of action for a tort, regardless of where the act or omission takes place. *Atkins v. Jones & Laughlin Steel Company,* 258 Minn. 571 (1960), 104 NW 2d 888, 892, 893; citing *Restatement of Torts,* "Conflict of Laws," sections 377-378.

This factor alone would be sufficient contact so as to uphold the court in the exercise of *in personam* jurisdiction in this matter. *St. Clair v. Righter,* 250 Fed Supp 155, 162.

Appellants attempt to distinguish such cases as *Gray v. American Radiator and Standard Sanitary Corporation,* 76 NE 2d 761 (Ill. 1961), from the instant case on the basis that they involve situations where products were issued into the "stream of commerce and could be reasonably

expected to enter foreign jurisdiction." While the defendants-appellants are not selling a product, they are selling a service. This service, as noted by the learned Michigan trial judge, is of such a nature that it:

> ". . . requires them to have the care and custody of the products and possessions of residents of other states. It is foreseeable that their negligent handling of these products and possessions may have tortious consequences in other states" (Opinion p. 2).

The defendants-appellants have taken voluntary action calculated to have an effect in the forum state. The transportation of food must be carefully done. Spoliation of food innocently purchased and eaten has resulted in grave and serious and severe injuries. These services cannot be performed nonchalantly. If the appellants have caused injuries to occur because of the manner in which their services were performed, they should be expected to answer for the consequences in the state where these "consequences" occurred. For this reason, Michigan courts should have the authority to exercise jurisdiction over the defendants-appellants.

II. THE IMPOSITION OF IN PERSONAM JURISDICTION OVER APPELLANTS DOES NOT CONSTITUTE AN UNDUE BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF ARTICLE I, SEC. 8, CLAUSE 3 OF THE UNITED STATES CONSTITUTION.

The final argument made by the defendants-appellants presents the question of the application of the Michigan "long arm statute" and the effect it would have on interstate commerce.

The defendants-appellants acknowledge willingly in their Brief that no undue burden is placed upon interstate com-

merce by subjecting foreign manufacturers of *products* to the jurisdiction of state courts wherein it is probable that the product would enter such a state once it has been entered into the stream of commerce. They then attempt to exclude themselves because they deal in services and not products. They further state that since these services have not entered the State of Michigan, the courts of Michigan cannot exercise jurisdiction over them.

However, the fact that a foreign corporation deals in services does not guarantee that their services will never cause harm or injury to another. Services can be performed negligently, just as products can be manufactured negligently. Once these services are offered into the "stream of commerce", those performing this service must be ready to answer for the improper performance of the service. This is especially true when it is the *shipper* who brings action against a carrier for negligent performance of the service and the consignee—The Kroger Company cross claims against the appellants. Nothing could be more reasonable than to expect that a shipper and consignee would suffer consequences from the negligent performance of services. The shipper should be therefore permitted to sue in its own forum.

Answering for the consequences of what was not done, what should have been done, or what act was done negligently does not impose an undue burden upon commerce.

The following factors distinguish the instant case from *Davis v. Farmers Cooperative Equity Company,* 262 U.S. 312 (1923) where recovery was sought in Minnesota for the loss of grain shipped under a bill of lading issued by the carrier in Kansas for transportation over its line from one point in that State to another:

(1) The transaction was in no way connected with the forum state; (at page 314)

(2) The jurisdiction of Minnesota Courts expressed by statute was asserted, whatever the nature of the cause of action and wherever it may have arisen; (at page 315)

(3) The plaintiff was not a resident of the state (at page 315).

In the instant case, the shipment originated from Michigan; Michigan Courts may not exercise their jurisdiction without regard to the nature of the cause of action and wherever it may have arisen as seen by Mich. Comp. Laws Supp. 1961, §600.715 et seq. The limitations existing as due process requirements are met; finally, the plaintiffs are residents of this State.

The Supreme Court noted in the *Davis* case, *supra,* that the absence of employees of carriers who were required to testify imposed a heavy burden upon carriers, until the Director General issued an order which required suit to be brought in the county or district where the cause of action arose or where the plaintiff resided at the time it occurred, citing *Alabama & Vicksburg Railroad Company v. Journey,* 257 U.S. 111. (Federal control was in existence at this time.)

The Court then went on to say:

> "The facts recited in the order, to justify its issue, are of general application, in time of peace as well as war." (p. 316)

Thus, the plaintiffs in the instant case would meet the requirements as set out by the *Alabama case, supra.*

The question of whether an undue burden would be imposed upon a corporation is a question of fact which in the instant case was decided in the negative by the trial court. See *Mitsubishi Shojii Kaisha v. Norddentscher-Lloyd* (1938), 169 Misc. 235, 6 N.Y.S. 2d 878.

CONCLUSION

Wherefore, Appellees—The Kroger Company—respectfully request this Court to grant their Motion to Dismiss for failure of the Appellants to present a substantial constitutional question.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1968

ADKINS TRANSFER COMPANY, INC.,
ADKINS CARGO EXPRESS, INC., and
TENNESSEE CARTAGE COMPANY, INC.,
Appellants,

vs.

HAROLD DORNBOS and BEVERLY DORNBOS,
Individually and d/b/a H. J. DORNBOS
& BRO., a Co-Partnership

and

THE KROGER COMPANY and
ROOKS TRANSFER LINES, INC.,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

MOTIONS TO DISMISS AND AFFIRM

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Appellees, HAROLD DORNBOS and BEVERLY DORNBOS, Individually and d/b/a H. J. DORNBOS & BRO., pursuant to United States Supreme Court Rule 16, hereby move the Court for an order dismissing the purported appeal on the grounds that the order appealed from is not a final judgment within the meaning of 28 U.S.C. §1257 and that no substantial constitutional questions are presented.

In the alternative, Appellees move the Court for affirmance of the order appealed from on the grounds that the decision of the trial court, confirmed by the Michigan Court of Appeals and the Supreme Court of Michigan, is manifestly correct and does not require further consideration by this Court.

STATEMENT OF THE CASE

Appellees accept the Statement of the Case in Appellants' Jurisdictional Statement, with the following important amplifications:

1. *The Complaint.* The alleged negligence of Adkins Transfer Company, Inc., is not limited to the transportation and delivery of the smoked whitefish chubs but includes particularly negligence in the handling and protection of the shipment and communication of information incident to its transportation.

Similar allegations of negligence are made against Tennessee Cartage Company, Inc.

2. *Affidavits in Opposition to Motions to Quash.* Appellees filed three affidavits and three depositions, which have the force of affidavits, in opposition to the motions to quash. The parties are in dispute as to the timeliness and admissibility of these affidavits. The trial court deemed the information in the affidavits unnecessary to its decision on the motions and did not rule on their admissibility. None of the parties have waived their positions with respect to this question, but in view of the status of the matter, no discussion of the information contained in the affidavits has been presented to either of the Michigan appellate courts and none will be set forth herein.

3. *Interrogatories and Request for Admissions.* Prior to the decision by the trial court on the motions to quash, Appellees served Interrogatories upon Adkins Cargo Express, Inc., Adkins Transfer Company, Inc., and Tennessee Cartage Company and requested admissions from Adkins

Transfer Company, Inc., pursuant to applicable Michigan General Court Rules. No objections were made and responses were filed. Among the facts revealed by the sworn answers to these pleadings were the following:

(a) Adkins Transfer Company, Inc., now Adkins Cargo Express, Inc., is the wholly owned subsidiary of Gateway Transportation Company, Inc., a common carrier which operates in Michigan.

(b) Adkins Transfer Company, Inc., had concurrences for through rates with common carriers operating in Michigan in 1963.

(c) Adkins Transfer Company, Inc., was a party to a general equipment interchange agreement with all major motor carriers in the area in 1963.

(d) Adkins Transfer Company, Inc., declined to give details of the operating revenues derived from its transportation of lading shipped from or destined to points in Michigan in 1963 on the grounds that determination of the answer would be impractical and financially prohibitive.

(e) Adkins Transfer Company, Inc., declined to give details of the carriers with which it interlined lading shipped from or destined to Michigan in 1963 for the reason specified in (d) above. It did, however, state that it handled shipments which either originated in or were destined to Michigan in 1963.

(f) Adkins Transfer Company, Inc., declined to state in pounds or as a percentage of its total lading the amount it transported in 1963 which was shipped from or destined to points in Michigan for the reasons specified in (d) above.

(g) During 1963, Adkins Transfer Company, Inc., did interchange trailers with other carriers and thereby transport trailers which had been loaded in whole or in part in Michigan. Also, this equipment was interchanged with numerous carriers which were authorized to operate in Michigan.

(h) The very same truck of Adkins Transfer Company, Inc., which transported the shipment of smoked whitefish chubs described in the Complaint from Chicago to Nashville, Tennessee, was also carrying a 14,000 pound shipment of a chemical product from the Dow Chemical Company in Midland, Michigan, to Nashville, Tennessee.

(i) It is the position of the Tennessee Cartage Company, one of the Appellants herein, that it was acting as the agent of Adkins Transfer Company, Inc., in delivering the smoked whitefish chubs in question to the Kroger warehouse in Nashville, Tennessee. Tennessee Cartage Company, Inc., operates both as a common carrier in interstate commerce and as a local carrier in the City of Nashville, Tennessee.

STATEMENT OF QUESTIONS PRESENTED

The questions presented for consideration by the Court in this appeal, when deprived of argumentative elements and phrased in view of the facts and the legal precedents are as follows:

1. Is the exercise of judicial jurisdiction over Appellants, limited to a cause of action arising out of the activity which connects them with the State of Michigan and which resulted in the causing of tortious consequences in Michigan, compatible with due process of law under the United States Constitution?

2. Does the exercise of judicial jurisdiction over Appellants, limited to a cause of action arising out of the activity which connects them with the State of Michigan and which resulted in the causing of tortious consequences in that state, result in an unreasonable and oppressive burden on interstate commerce?

The Judgment of the Supreme Court of Michigan is not final.

Appellees concede the arguments and authorities contained in the Jurisdictional Statment to the effect that the requirement of finality under 28 U.S.C. §1257 is not entirely mechanical and arbitrary. Appellees further concede that in the absence of review by this Court, Appellants will be required to defend at a trial on the merits.

Appellees emphasize, however, that the judgment of the Supreme Court of Michigan was "without prejudice." (Appendix C, Jurisdictional Statement). The question there involved may be raised again on a further appeal. The Michigan Court has merely determined, under the facts and arguments presented, that constitutional jurisdiction over the Appellants is so probable that it is not unfair or unjust to require them to proceed to trial. This decision was undoubtedly also made in view of the desirability of orderly, complete judicial proceedings, rather than piecemeal decisions, and the potential harm to Appellees in further delay.

Still another factor is relevant. There is pending and preserved the question of admissibility of additional affidavits and depositions deemed unnecessary to the decision by the trial court. Reversal of the trial court's order can only result in resolution of this issue and further appeals on the matter of jurisdiction. The information in question will be presented at trial and will obviate the necessity for further interlocutory proceedings related to its present admissibility.

For these reasons it is respectfully requested that the Court consider the matter of finality at the outset in this case and make such determination thereon as it deems just and consistent with the statutory policy in view of the circumstances presented.

CONSTITUTIONAL ARGUMENTS ARE NOT SUBSTANTIAL

A. The exercise of judicial jurisdiction over appellants herein is manifestly compatible with due process of law under the United States Constitution.

The statement of the question presented with respect to due process of law set forth on page 4 above, intentionally emphasizes the limited judicial jurisdiction asserted in this case. Aside from quotation of the applicable Michigan Statute on page 3 of the Jurisdictional Statement, Appellants ignore, as they have done in all previous proceedings in this case, this highly essential element. Jurisdiction here is, under the terms of the applicable statute, carefully limited to the single cause of action in tort resulting from acts by the Appellants which have caused tortious consequences to occur within Michigan. The relation between the scope of the jurisdiction sought and the facts and circumstances under which it is sought is essential to a determination of questions of due process.

The impact of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), upon subsequent jurisdictional concepts is well known. The most important feature of that case is the predicate laid therein for distinction between an exercise of general *in personam* jurisdiction and *in personam* jurisdiction limited to a cause of action arising out of a relation with the forum state. In analyzing earlier cases, this Court pointed out that they included (1) those upholding jurisdiction where the activities of the foreign corporation were continuous and systematic and the cause of action arose therefrom, (2) cases denying jurisdiction where the activity was isolated or casual and the cause of action was unrelated to them, and (3) cases upholding jurisdiction on the basis of sufficient activities even though the cause of action was entirely distinct from those activities. See discussion at 326 U.S. 310, 317-318. Concluding the analysis, the Court observed:

> "It is evident that the criteria by which we mark the boundary line between those activities which justify

> the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantative. The test is not whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." 326 U.S. 310 at 319.

In so doing, the Court expressed a flexible standard which recognizes the minimal significance of state lines in modern intercourse among the states. Moreover, emphasis was placed upon the nature and quality rather than the quantity of the defendant's activities and the relation of the cause of action to those acts.

The standard set forth in *International Shoe* has been consistently followed in subsequent decisions by this Court and is the basis for the recent revision of jurisdictional statutes in most states, including Michigan. Acting under the principles set forth in *International Shoe*, the new state statutes have distinguished between activities which are constitutionally sufficient for an exercise of general jurisdiction and those activities, described in the so-called "long-arm statutes," which are sufficient only for a limited exercise of jurisdiction.

Jurisdiction has not been sought or upheld in this case under the statutory criteria for general jurisdiction but rather under the single-purpose, limited jurisdiction authorized in subsection 2 of the following Michigan Statute, M.S.A. §27A.715:

> "The existence of any of the following relationships between a corporation or its agent and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise limited personal jurisdiction over such corporation and to enable such courts to render personal judgment against such corporation arising out of the act or acts which create any of the following relationships:

(1) The transaction of any business within the state.

(2) The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort.

(3) The ownership, use, or possession of any real or tangible personal property situated within the state.

(4) Contracting to insure any person, property or risk located within this state at the time of contracting.

(5) Entering into a contract for services to be performed or for materials to be furnished in the state by the defendant."

As in other states, the Michigan Revised Judicature Act, which includes the foregoing statute, was adopted only after thorough study and research by a joint committee consisting of judges, lawyers, professors and legislators. The effect with respect to the jurisdiction of Michigan Courts was clearly designed to authorize jurisdiction compatible with the economic trends and contemporary adjustment of concepts of due process that had occurred in the preceding fifteen years. Sofar as is relevant here, M.S.A., Section 27A.715(2) contemplates personal judicial jurisdiction over a non-resident foreign corporation which causes the occurrence in this state of consequences resulting in an action for tort, but the authorized jurisdiction is strictly confined to causes of action which arise out of that relationship to the state.

This Court in *International Shoe* noted a trend of expanding the permissible scope of state jurisdiction over foreign corporations attributable to the fundamental transformation of our national economy over the years. Today, the trend is far more clear. It illustrates dramatically that due process cannot arbitrarily confine state court authority within boundary lines which no longer have significance in the world of commerce. Due process does not require

such an artificial limitation under the flexible standard established in *International Shoe*:

> "More recently in International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, the court decided that 'due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." ' " *McGee v. International Life Insurance Co.,* 355 U.S. 220 at 222-223 (1957).

What then are the contacts of these appellants with this state?

Each of them accepted and undertook the responsibility of participating in the transportation of clearly marked, perishable foodstuffs from the point of origin at Appellees' place of business to the destination in Nashville, Tennessee. Each was a participant in an unbroken movement of commerce from Michigan to Tennessee. This was done in the ordinary course of their regular business and was undertaken for profit. An integral part of the responsibility that accompanied this opportunity for profit was the duty to exercise reasonable care to avoid injury in connection therewith. Each of them breached this responsibility and committed actionable negligence. The results are common knowledge. Numerous deaths and illnesses occurred, there was wide publicity and Appellees and their industry generally suffered extensive injuries in Michigan. The perishable food products were shipped by Appellees from Michigan under a bill of lading so indicating, and serious tortious consequences occurred in Michigan as the result of the specific negligence of these Appellants with respect to this particular shipment. Therefore, this cause of action and the acts of these Appellants bear a substantial relation to the State of Michigan.

This is not a case in which Appellees' residence stands alone as the only connection with the forum. It is a case of destruction of a long-established, Michigan business, with consequent effects upon its resident owners. It arises

out of and is limited to the handling of Appellees' Michigan products by Appellants.

In addition to the transportation and handling of Appellees' products in this instance, Appellant Adkins Transfer Company has other and additional contacts with Michigan. As a common carrier on major north-south routes in the Central United States, it was, and is, a connecting carrier in many shipments of goods to and from the State of Michigan. The same Adkins' trailer which carried the shipment of fish in question from Chicago to Nashville also contained a large load of a chemical product enroute from Midland, Michigan, to Nashville.

Adkins had concurrences for through rates with other carriers operating in Michigan. These are agreements to haul lading as a connecting carrier on a total rate which is less than the sum of the standard rates of the participating carriers for their respective legs of the journey. They are evidenced in the published tariffs, and they alone are solicitation of Michigan business. Adkins also interchanged trailer equipment with other carriers operating in Michigan and thereby transported trailers loaded in whole or in part in Michigan. The specific shipment, then, was only part of Adkins' general participation in the flow of goods to and from the State of Michigan. Tennessee Cartage Company, on the other hand, was similarly involved with respect to shipments to Kroger in Nashville, Tennessee, and by its own admission herein, was the agent of Adkins.

Under the decisions of this Court, the contacts with the foreign state arising out of a single transaction are sufficient to satisfy the requirements of due process if they are reasonably related to the state and if the jurisdiction is sufficiently limited. The additional contacts between Adkins and the State of Michigan strengthen the conclusion that the limited jurisdiction sought herein is compatible with due process of law.

Appellants argue, on pages 15 and 16 of the Jurisdictional Statement, that they have not invoked any benefit or protection from the laws of the State of Michigan. It is true that their operating authority, narrowly viewed, does not include the State of Michigan. However, it is apparent from even the small factual detail set forth in this record

that Appellant Adkins at least is significantly involved with the commercial and economic activities in the State of Michigan. Along with a limited number of other business entities, it is the only company authorized and permitted to carry lading moving between the State of Michigan and certain other portions of the United States. Undoubtedly, if such became necessary under appropriate circumstances, both of these Appellants would rely upon the laws of the State of Michigan, and indeed, even the Michigan judicial system, for enforcement of their right to be paid and to earn profits by reason of this activity. Perhaps they have not been required to invoke the benefits and protections of the laws of Michigan in the past, but there can be no doubt that they operate in view of these benefits and protections and with the comfortable knowledge that they can be availed of if and when that becomes necessary. Such opportunity carries with it the duty to answer to others who are equally protected and benefited by such laws.

The Appellants similarly argue that they were required to carry the lading in question. They urge this fact to absolve them from accounting in Michigan to Michigan residents upon whom they have, by their negligence, inflicted tortious consequences in Michigan. The argument standing alone is without realistic force. Moreover, it ignores the fact that these Appellants are actively engaged in this enterprise for a profit. They solicit, through published tariffs and rate and equipment agreements, the business of carrying commerce destined to and from the State of Michigan. They undoubtedly seek the broadest authority with respect to the type of goods that they can carry. They could easily limit their responsibility in this case by yielding their authority to carry perishable foodstuffs, or even smoked fish.

Appellants concede the principles expressed in *International Shoe* and *McGee v. International Life Insurance Co.* They tout certain language in the contemporary case, *Hanson v. Denckla*, 357 U.S. 235 (1958), as a requirement of tangible, physical activity within the state. An examination of both the facts of *McGee* and *Hanson*, however, reveals that each is a proper application of the "minimum

contacts'' principles upon their respective facts, and that the causing of tangible consequences under these circumstances is sufficient for limited jurisdiction.

In *Hanson*, the defendant trustee was not only a foreign corporation, but it had no contacts whatsoever with the forum, Florida. So far as the record discloses, it made no effort to and did not, even outside Florida, perform services for citizens of that state. Its only connection was as trustee of a trust created by someone who subsequently moved to Florida. The issue was the validity of the trust agreement. Considering the nature and quality of the transaction sued on, the *Hanson* decision is not inconsistent or even incompatible with the general concepts enunciated earlier by this Court or with the exercise of jurisdiction in this case. Nevertheless, four Justices strongly dissented from the majority opinion on the grounds that even the facts of *Hanson* did not offend due process. 357 U.S. 256-264. The dissents stressed that due process is not a mechanical territorial limitation on the powers of the states but rather the guarantee of a fair and adequate opportunity to be heard.

The Appellants, of course, would confine the *McGee* decision to cases involving insurance contracts. Clearly, the principles of *McGee* are broader. They are equally applicable to this case, in which the jurisdiction is carefully limited to a single cause of action arising out of the causing of tortious consequences in the State of Michigan. Under the principles of the cases decided by this Court, these contacts are sufficient to uphold the limited jurisdiction in question.

Hanson is not inconsistent with *McGee*. On close analysis the decisions bear striking evidence of the validity of the principles of limited jurisdiction involved here. *McGee* by reason of a special state statute actually involved limited *in personam* jurisdiction. *Hanson* more closely approximated principles of unlimited jurisdiction. Both support the result reached by the Michigan Courts in this case.

Appellants, nevertheless, assert that the trial court applied the principles incorrectly, but as the trial court said in its opinion:

> "These defendants are in the business of carrying goods in interstate commerce. It is reasonable to assume that they solicit and hopefully anticipate such business. They are in the position of being able to protect themselves from the consequences of their own derelictions. They understand that the nature of their business requires them to have the care and custody of the products and possessions of residents of other states. It is foreseeable that their negligent handling of these products and possessions may have tortious consequences in other states."

Considerations of traditional fairness and substantial justice, as directed in *International Shoe,* verify the conclusion. This action seeks to make whole, so far as they ever can be, residents of Michigan who have been injured here by the negligence of the Appellants. Notions of fairness and justice are subjective, and it would appear manifestly fair to require them to answer for the wrongs they have committed where the consequences occurred. The equities are even more patent when it is again noted that the jurisdiction over them is expressly limited to the action arising out of those consequences. The justice is particularly apparent when, as here, the economic ability and well-being of Appellees has been largely destroyed by the acts of the Appellants. It would seem no more unfair, in view of modern communications and transportation, to subject them to suit in Michigan where the wrong occurred than, for example, in Illinois for Adkins or Kentucky for Tennessee Cartage, where they concede amenability to suit. The State of Michigan has a proper interest in affording a forum for redress of wrongs to its citizens and has expressed that interest in the Revised Judicature Act.

Most significant, however, is the fact that Michigan is the only forum in which Appellees can join all of the defendants named herein in one action. The only alternative is the expensive burden of multiple actions and the attendant risk of inconsistent verdicts.

> "It would thus appear that the meaning of due process in this context can be determined only by judicial

> evaluation of the competing interests, namely those of a defendant in not being called upon to defend in that forum, those of the plaintiff in being able to acquire jurisdiction over a defendant in a place where the cause of action arose, and finally the interest of the state in being able to afford adequate protection of its laws to its citizens and others within its jurisdiction." *Compania Maritima del Nervion v. Amerop Commodities Corp.*, 237 F. Supp. 73, 77 (E.D.La. 1964).

Considerations of due process do not weigh heavily against Appellants herein; they militate strongly in favor of Appellees.

Appellees submits that an analysis of the facts before the Court and the quality and nature of the transaction involved reveals that the requisite minimal contacts with the State of Michigan are such that the exercise of limited personal jurisdiction over these non-resident appellants comports with notions of fair play and substantial justice. Appellees believe that these conclusions are sufficiently patent to warrant an order dismissing the appeal or affirming the order appealed from.

B. The exercise of judicial jurisdiction over appellants herein does not result in an unreasonable and oppressive burden on interstate commerce.

Although not argued in their brief on the motions to quash before the trial court, Appellants did, in oral argument, mention burden on interstate commerce and the trial court commented upon it in his opinion. Subsequently, Appellants have briefed and argued this point in support of their position more expansively. The issue, of course, is not whether the jurisdiction of the Michigan court is a burden on commerce. Almost any litigation is burdensome. The question, instead, is whether the limited exercise of jurisdiction here sought is so unfair that it is an unreasonable and oppressive burden on interstate commerce.

Canadian Pacific R.R. v. Sullivan, 126 F.2d 433, 438 (1st Cir. 1942). The question is to be viewed in light of the following facts:

1. The tortious consequences upon which jurisdiction is based are injuries to Michigan residents.

2. The injuries arise out of the negligent handling of Appellees' products, Michigan commerce, shipped by Appellees and transported by Appellants in the ordinary course of their business for profit.

3. The carriage of Appellees' shipment was, for Adkins at least, part of a general contemporary participation in the flow of commerce to and from Michigan.

4. Appellant Tennessee Cartage was the agent of Appellant Adkins.

5. The asserted jurisdiction is carefully limited to a cause of action arising out of the transaction which resulted in consequences in Michigan.

Appellants rely principally upon *Davis v. Farmers' Co-op Equity Co.*, 262 U.S. 312 (1923). The *Davis* case in turn involved a statutory authorization of general, unlimited jurisdiction:

> "It is asserted, whatever the nature of the cause of action, wherever it may have arisen, and although the plaintiff is not, and never has been a resident of the state." 262 U.S. at 315.

Davis was distinguished and "confined narrowly within the bounds of its own facts" in *International Milling Co. v. Columbia Transp. Co.*, 292 U.S. 511 (1934). Moreover, it was decided at a much earlier stage in the development of our national economy. It is, accordingly, factually distinguished and based upon circumstances prevalent at a much earlier stage in our history.

Appellants also rely, on page 19 of the Jurisdictional Statement, upon certain defamation cases in which the courts were balancing considerations of freedom of speech and press with considerations of due process. They urge

that while the due process clause is concerned primarily with fairness to the individual, the commerce clause is designed to facilitate and assist the development and functioning of transportation and business activity generally in our country. Thus, they pose the limited jurisdiction sought in this case as a threat to the national economy.

The argument ignores the fundamental purpose and nature of the commerce clause. The clause was not included in the Constitution for the purpose of protecting or indeed treating specially the limited number of persons and entities engaged for profit in the transportation of interstate commerce. It was, in fact, intended to shield from oppressive and unreasonable burden the general public involved both as persons and businesses shipping such commerce in the course of their business and persons and businesses receiving and consuming such commerce. Thus, it would appear manifest that the determination of whether the jurisdiction sought in this case is an unreasonable and oppressive burden on interstate commerce must be made in view of the rights and privileges of the public at large, including the Appellees.

In this context, Appellants' argument becomes an effort to use the commerce clause as a shield for themselves against a claim by persons for whom the protection of commerce clause was intended. It is simply not an unreasonable burden or oppression on interstate commerce to uphold the jurisdiction sought in this case. Rather, the attendant responsibility of answering for wrongs committed in the course of conducting business under the privilege of the commerce clause upholds the validity of the jurisdiction.

It is no answer to assert that the inconvenience of defending the suit in the Michigan forum will cause disruption of interstate commerce. The modern facilities for communication, modern rules permitting the taking of testimony by deposition and the current, jet-age facilities for transportation make the inconvenience no greater than it would be if the suit were tried in Illinois or Indiana or Kentucky and only insignificantly greater than it would be if the suit were tried in Tennessee. In fact, there has been no showing on the part of Adkins, at least, that its prin-

cipal witnesses would not be closer to Michigan than to Tennessee.

Appellants argue that they were helplessly required to carry the Michigan commerce in question. This argument does not admit the fact that they were actively engaged in soliciting the transportation of commerce to and from Michigan. It does not recognize that they could have taken steps to limit the scope of their responsibility, although these would have undoubtedly limited the profitable scope of their activities. Most importantly, however, the argument ignores the opposite viewpoint. Appellees, in attempting to move their commerce from Michigan to Tennessee, could choose among only a limited number of common carriers given exclusive authority to transport such commerce. In effect, Appellees were required to use the services of the Appellants or one of their few counterparts. It cannot be doubted that Appellants have actively and aggressively competed for the privilege, indeed an exclusive privilege, of carrying this lading. The jurisdiction sought requires only that they assume the coequal responsibility that accompanies this privilege.

It follows that unreasonable and oppressive burden is not demonstrated. Here again, the conclusions of the trial court, quoted by the Michigan Court of Appeals, were concise and correct.

> "The court rejects any argument that such a result will be an undue burden on interstate commerce or will offend 'traditional notions of fair play and substantial justice.' The realities of modern commercial transactions dictate that modern concepts of jurisdiction be considered for the purpose of enlightened handling of disputes arising from modern conditions and transactions. Shall we hold that there can only be fair play and justice where the law provides that all those who do business with these defendants must go to those states wherein they are doing business for adjudication of their grievances rather than to hold that the forum of justice may be the state where tortious consequences occur? To ask the question is to answer it. The court finds nothing offensive to the

concept of fair play and justice in holding that the claimant may resort to the forum where the consequences of an act occur." (Appendix B, Jurisdictional Statement).

It follows that the decision of the Michigan trial court, affirmed by the Michigan Court of Appeals and the Supreme Court of Michigan, upon both of the questions presented, was correct. Appellees urge that this Court consider its motions in view of the paramount question of the correctness of the decision below, and also in view of the heavy cost of further delay in a trial upon the merits of a negligence action based upon events occurring more than five years ago. It is respectfully submitted that the appeal should be dismissed or the order appealed from affirmed without further argument.

Respectfully submitted,

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PER CURIAM

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

ADKINS TRANSFER CO., INC., ET AL. *v.* DORNBOS ET AL.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 738. Decided January 13, 1969.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of a final judgment.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that the appeal should be dismissed for want of a substantial federal question.

MR. JUSTICE STEWART is of the opinion that further consideration of the question of jurisdiction should be postponed to the hearing of the case on the merits.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.